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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 193

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,

Appellant,

vs.

O. N. LINDELL,

Appellee.

On Certificate of the Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

THE QUESTION CERTIFIED

There has been certified to this Court under section 239 of the Judicial Code, the question:

> "Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out

> of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and, further, that where such cross-claims have existed 'the two demands shall be deemed compensated,' is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of setoff, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?"

That question is not whether a carrier must, or must not, collect transportation charges *only in money*; nor whether the shipper may or may not collect damages *only in money;* or, stated differently, whether the shipper is or is not entitled to urge a claim for damages *in payment* of tariff charges due upon an interstate shipment.

The question, in brief, is, where collection of transportation charges has not been made, and cannot be made except through suit, and where damages to the shipper, arising out of the same transaction, have not been recovered, and cannot be recovered except through suit, may the respective claims be adjudicated in one action, or must there be two separate suits, resulting in two separate judgments, and then (as will hereinafter be mentioned), but not until then, on motion made in one case or the other, one judgment be offset against the other judgment.

The appellant states (page 5 of Brief) "Under the Hepburn Act a carrier must collect its charges only in money. It may not collect a greater or less or different compensation than the rates, etc., specified in its tariffs. A carrier may not accept a release of damages in payment of transportation charges." This is not disputed by the appellee, nor does the appellee claim for anything other than a reasonable and practicable interpretation or construction of the Transportation Act.

The facts in this case, as certified, are that the carrier *did not* collect its transportation charges; the shipper *did not* collect his damages, nor the carrier pay same. The carrier brought suit to recover such charges, and in and by that suit it sought to obtain a money judgment against the shipper. The shipper, by his counterclaim, in effect sought to recover a money judgment against the carrier for loss suffered by the shipper as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment.

An illustration may be made as follows: A purchases grapes from B but neglects to make payment. When suit is brought by B for the purchase price of the grapes, A claims that there is a sum owing to him for grain which he sold to B, and a counterclaim to B's demand is interposed by A. In such case the appellant would say that A is urging the right to pay

for the grapes with grain, and not with money. Such assertion is incorrect or misleading. The real situation is that, if an amicable settlement is made out of Court, there is, theoretically, a payment made by A to B for the grapes, and at the same time, or at a different time, there is a payment made by B to A for the grain. It may be that all that will be accomplished at one conference of those parties, at which they may go through the unnecessary, if not ridiculous, formality of A paying his debt to B by passing the entire amount in money over the table, and thereupon the whole, or a part of the same money is passed back by B in payment of his debt to A. If the matter is brought before the Court, there is no thought of paying for one commodity with another commodity. But in determining the rights of the parties, the Court ascertains the amount owing by each to the other, and, since the Court is called upon to collect an amount from each party, it does so in one action, and, in making such collection it avoids circuity and declares as a setoff from the one, the amount of the other.

Of course, if it be true that whenever a carrier is a party to a lawsuit, it is to be given special privileges, or if it be the policy of the law that it shall be made as difficult as possible for a shipper to obtain what may be justly due him by way of damages from the carrier, having in mind that if the shipper is thus made to realize that he must spend much more in prosecuting his claim against the carrier than he will re-

cover at the end of the litigation, he may decide to bear his loss in silence, then it may follow that in no such case can the shipper maintain a counterclaim, but otherwise, we claim that such may be done; that the law permits and requires such procedure, and that same is not forbidden by the Interstate Commerce Acts.

The appellant (page 6 of Brief) says: "The possibility of collusion is not the only reason for denying shippers this right. Collusion is not necessary to sustain a prosecution for rebating. If shippers may plead counter-claims, the difficulty of collecting undercharges will be greatly increased, especially where amounts are small; and as a practical matter the policy of the law will be defeated, even if there is no collusion," and appellant (page 17) quotes from the opinion of Judge Wade in the Hoopes case (233 Fed. 135, at p. 136) to the same effect:

> "Very often the suits are for small amounts, and if the shipper can, by counterclaim, acquire jurisdiction of the carrier in an action for damages to freight, he can force the carrier to spend much more in prosecuting its action for freight charges than the freight charges amount to."

We cannot subscribe to any such view, but, on the contrary, we contend that each party, carrier and shipper, has rights which the law and the procedure of the Courts should respect and enforce and that in so far as may be consistent with law and equity, the carrier should not *force the shipper to spend much more in*

prosecuting his action for damages than the sum claimed, or that is recoverable, amounts to.

We copy from Central Appalachian Co. v. Buchanan, 90 Fed. 454, 462, the following:

> "It was observed by the master of the rolls in Jeffs v. Wood, 2 P. Wms. 129, that:
> 'It is against conscience that A should be demanding a debt against B, to whom he is indebted in a larger sum, and would avoid paying'; and that "in these cases equity will take hold of a very slight thing to do both parties right."

> In Carr v. Hamilton, 129 U. S. 255, 9 Sup. Ct. 295, Justice Bradley said that:
> 'Natural justice in equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only should be considered as due.' "

PRACTICE AND PROCEDURE REQUIRED OR PERMITTED BY STATE AND FEDERAL LAWS

Section 914 of the Revised Statutes (U. S. Code, Title 28, Sec. 724) provides that:

> "The practice, pleadings, and forms and modes of proceeding in civil causes * * * in the district courts, shall conform, as near as may be to the practice pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

The practice and modes of procedure for like causes in the courts of record in the State of California are outlined as follows:

C. C. P., Sec. 437. "The answer of the defendant shall contain: * * *

2. A statement of any new matter constituting a defense of counterclaim."

C. C. P., Sec. 438 (as enacted in 1872): "The counterclaim mentioned in the last section (section four hundred and thirty-seven) must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

As amended in 1927:

"The counterclaim mentioned in Section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."

C. C. P., Sec. 439:

"If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

C. C. P., Sec. 440:

"When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

23 Cal. Jur., p. 241, Sec. 17:

"If the transaction out of which an action on contract arises has involved a tort on the part of plaintiff, the defendant may counterclaim damages on that account."

Parish v. Studebaker, 50 Cal. App. 719, 723:

"The trespass found to have been committed by the plaintiff against the defendants was, of course, a tort, but we think that it was such a tort as would be connected with the subject of the action, as defined in subdivision 1 of the section quoted. It must be admitted that separate torts cannot be set up in complaint and counterclaim. (Wigmore v. Buell, 116 Cal. 94; 47 Pac. 927). The court has never decided, however, that torts may not be set up one against the other, so long as they fall within the code classification as being connected with the subject of the action or arising out of the transaction set forth in the complaint * * * *. Here a claim for damages was made for a tortious withholding of the property, and we are of the opinion that the trespass alleged to have been committed by the plaintiff may be properly set up in favor of the defendants by counterclaim as being a cause of action connected with the transaction alleged by the plaintiff."

2. Hutchinson on Carriers, (3 Ed.) Sec. 799:

> * * * "The party liable for the freight, however, when sued, may set up, in answer to the claim, any breach by the carrier of his contract and will be allowed to set up any loss or damage to the goods for which he is liable or sustained by him in consequence of unreasonable delay in their carriage or delivery."

Said Judge Bledsoe in the District Court of the Southern District of California in Payne, Director General of Railroads v. Clarke, 271 Fed. 525:

> "The pleading of the counterclaim herein is in accordance with the established practice in California, Section 438, Code of Civil Procedure, and as a matter of fact, if defendant has a claim and does not plead it herein, there is grave doubt if under California practice he would not be denied the opportunity of asserting it hereafter in any form. California Code of Civil Procedure, Sec. 439."

In Pennsylvania R. Co. v. Bellinger, 166 N. Y. S. 652, the Court said:

> "There is no provision in our Code which restricts the right to plead such a cause of action as a counterclaim, because of the theoretical objection set forth in the above mentioned federal cases. The practice of this court in relation to the allowance of a counterclaim must be governed by the Code of Civil Procedure, and under that Code the counterclaims here in question are allowable, Section 501."

The North Chicago Rolling Mill Company vs. The St. Louis Ore and Steel Company, 152 U. S. 596, 88 L. Ed. 565, 572:

"The adjustment of demands by counterclaim or setoff rather than by independent suit is favored and encouraged by the law, to avoid circuity of action and injustice. Florida R. Co. v. Smith, 88 U. S. 21 Wall. 255, 22 L. Ed. 513."

See also Partridge v. Phoenix Mut. L. Ins. Co., 15 Wall. 573, 21 L. Ed. 229.

But appellant claims that all such is forbidden by the following provision of the Hepburn Act: * * * "nor shall any carrier charge, demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person or privileges or facilities in the transportation of passengers or property, except as are specified in such tariffs."

However, under the Carmack Amendment to the Interstate Commerce Act (34 Stats. 594, Title 49 U. S. Code, Chapter 1, Section 20, Subd. 11) in requiring that the carrier on receiving property for transportation shall issue a receipt or bill of lading therefor, it is also provided that the carrier, "shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused to it by any common carrier,

railroad, or transportation company to whom such property may be delivered or over whose line or lines such property may pass within the United States, or within an adjacent foreign country when transported on a through bill of lading."

Thus it appears that where the shipper fails, neglects or refuses to pay, the carrier may bring suit and recover a judgment payable in money. Also the shipper may maintain a suit for damages against the carrier and may recover a judgment payable in money.

Perhaps on process issued on the judgment against the carrier a collection in money can be had. Perhaps on process issued on the judgment against the shipper, a collection in money can be had, and perhaps not, as he may have become insolvent or have no available property upon which a levy of execution may be made.

In such case, is the law so inflexible, or the procedure so impotent, that the carrier must pay in money the judgment against it, and be unable to collect anything whatsoever on its judgment against the shipper?

Possibly the red-tape by which it is claimed that the parties are bound through the acts of Congress may be unwound through the marshal proceeding to collect the judgment in money from the carrier for the shipper, and then proceed to collect back from the ship-

per the money for the carrier. But such procedure is neither businesslike nor practicable.

However, it undoubtedly is true that where A has recovered a judgment against B, and in the same or another forum, B has recovered a judgment against A, the proceedure, whether taken in law or in equity, will allow one judgment as an offset to the other. Said the Supreme Court of California in the case of Haskins v. Jordan, 123 Cal. 157, 160:

> "The power to set off one judgment against another exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes. (Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76). The regularity of such a proceeding was recognized in Jones v. Chalfant, 55 Cal. 505, and to the same proposition may be cited Freeman on Judgments, 4th Ed., Sec. 467 et seq.; 22 Am. & Eng. Ency. of Law, 445; Chandler v. Drew, 6 N. H. 469; 26 Am. Dec. 704. While the right to adjust the conflicting claims of its suitors in the mode indicated was originally exercised only by equity as an incident to its powers, courts of law later came to adopt the same procedure, and in this state, where in the same forum the litigant is entitled to such relief, legal or equitable, as his showing justifies, the particular distinction between the powers of courts of equity in this regard and courts of law ceases to be important. In every case the suitor has the right to ask for the setoff, and in every proper case as of right the motion should be granted."

Since such may be done, it would seem to be a remarkable condition of affairs where if, on the one

hand the shipper fails to pay, the carrier must bring a separate suit against the shipper to recover a judgment against him, and if on the other hand, the carrier refuses to settle for the damages done to the shipment, the shipper must bring a separate suit against the carrier to recover a judgment for the amount of the damages suffered, the parties may thereafter go through the maneuvers of a proceeding by motion or otherwise in the one court to have one judgment to the amount thereof set off against the other judgment. Just how the law requiring the transportation charges to be collected *only in money* would be observed and complied with by the circuity of action in such case, any more than would be done directly in a case where the shipper was permitted to interpose a counterclaim in a case such as is now before the court, is not clear.

However, the mistake is in stating over and over again a proposition which, as so stated, is incorrect. Thus the appellant (page 15 of brief) referring to the decision in the Tectonius case says that the effect of which was "to bring about in court the payment of the carrier's charges in something else than money," and again: "Upon sound principle, the rule that a carrier's charges must be paid only in money extends to the assertion in court of the right *to pay* such charges by offsetting a counterclaim against them." And again on page 16, "that out of court shippers may not *pay* their freight charges *with damage claims.*"

All such, of course, is illogical and misleading. By interposing a counterclaim for damages in a suit for transportation charges the shipper is not attempting to pay those charges by a claim for damages, nor in a suit brought by the shipper would the carrier be paying a claim for damages by setting up in its answer a claim for an unpaid freight bill. Each party seeks the aid of the court in establishing and aiding in the collection of the amount which such party is entitled to receive from the other, and when one party has instituted a suit, then instead of the bringing of another and different suit, the controversy is disposed of by the court rendering a decision specifying the amount allowable on plaintiff's complaint, and also the amount allowable on defendant's counterclaim. In such case, if form is of more importance than substance, or, theoretically, if necessary, for the purpose of bookkeeping, the defendant may pay in full the amount allowed on the complaint, and the plaintiff immediately hand back the amount allowed on the counterclaim. But the practical effect is the application of setoff or recoupment.

THE DECISIONS OF THE DISTRICT COURTS AND OF STATE COURTS

The title of the various decisions rendered in the District Courts and by the State Court, have been set forth in the certificate of the Circuit Court of Appeals

filed herein, and are discussed in Appellant's brief. As those cases will be read, and the reasons given therein for the opinions there expressed will be duly considered it will serve no useful purpose for the appellee to quote therefrom at length. However, from the viewpoint of appellee the entire matter has been so clearly and correctly stated by Mr. Justice Powell of the Court of Appeals of the State of Georgia, in the case of Battle v. Atkinson, 71 S. E. 775, that we quote at length from the opinion as follows:

> "Is there anything in the act of Congress, commonly known as the 'Hepburn Act,' which would prevent a court from allowing the defendant to take advantage of this right of recoupment as against the carrier's suit to recover charges upon a shipment?" And in answer to this inquiry the Court said: "Under the act of Congress and the decisions that have been made in reference thereto relating to the carrier's charges for interstate shipments, it is now settled beyond controversy that no device or arrangement of any kind is permissible by which the carrier can accept anything but money in payment of freight charges, and that the sum so charged must be the published rate applicable to all persons alike and subject to no rebate for any cause whatever. The act of June 29, 1906, amending the previous law, prohibited the carrier from charging, collecting, or receiving from any person or persons, not only a 'greater or less compensation' for any services to be rendered than is charged, collected, or received from all other persons for like services, but also from charging collecting, or receiving 'different compensation'; and to require one person to pay in money and to allow another person to pay in commodities or in promises, or in any other way than

in money violates this prohibition. L. & N. R. Co. vs. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297; Chicago Ry. Co. v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 305 * * *." "If the carrier has completed transportation and has collected the usual charges from the shipper, but has damaged the goods or has allowed them to become damaged by causes for which it is liable, the shipper has a right of action against the carrier for the damage, and these damages are payable in money, just as the carrier's claim for transportation charges is payable in money. The United States Supreme Court referred to this principle (that the carrier must pay as well as be paid only in money) in the Mottley Case, supra, saying, 'The passenger has no right to buy tickets with services, advertising, releases, or property, nor can the railroad company buy services, advertising, releases or property with transportation.'

Here we have a case where the carrier did not receive cash for the transportation, and where it did not pay cash in settlement for the damages it had done to the shipment; and it brings its action against the shipper, asking the court to lend the aid of its processes for the collecting of the money due for the freight charges, and the defendant merely asks the court, while it has both parties thus before it, also to collect for him the money due by the carrier for its delinquency in executing the same contract. The amount due to the one party is liquidated, and the amount due to the other is unliquidated; but the court has the means and the power to liquidate the latter claim, and to place it upon the same footing as the former. The very object of allowing pleas of recoupment and setoff and all similar pleas is to prevent a multiplicity of suits, and to enable the

court, when it has all the necessary parties before it, to adjudge all their respective rights, and to render a judgment which will finally end the controversies pending between them. Now, if the shipper had sued the carrier in a separate action and had recovered judgment, say for the $1,200 he alleged to be the amount of the damage done to the shipment, and the carrier had paid over to him twelve $100 bills, there would certainly be nothing in the spirit or the letter of the act of Congress to prevent the shipper from taking four of these bills and paying to the carrier its claim for the freight charges. The effect of the plea in the present case is simply a prayer on the defendant's part that he be allowed to consummate this same end through the offices of the court, which the plaintiff has first invoked. It is true that the court, in rendering its judgment, will dispense with the necessity of the plaintiff's paying over the full amount of the damages, and of requiring the defendant to hand back the amount due the plaintiff, and will strike a balance, and will merely render a judgment requiring the losing party to pay the difference; but it is not with mere incidentals such as these that the act of Congress deals, or which it was intended to prohibit. It is the substance of the thing at which the act of Congress aims, and the form which the transaction assumes is immaterial. No matter how plausible or ingenious may be the form of the transaction, if the spirit or the letter of the act is violated, the transaction is illegal. And, on the other hand, any form may be adopted which does not violate the letter or the spirit of the law; and for the court to proceed to adjust the respective rights of the parties in a transaction such as this is in no sense a device for the remitting or the refunding of any portion of the rates and charges with which the act of Congress deals."

Finally, the appellant (page 25), referring to the section of the Transportation Act of 1920 as contained in U. S. Code, Title 49, Sec. 3, Subd. 2, says, that "Under this section it is mandatory for the carrier promptly to collect freight charges in all cases. No exception based on loss or damage to the shipment is made. Charges must be paid at once."

Also on page 26, "All that will be necessary in any case for a shipper to compel the indefinite extension of credit by a carrier, notwithstanding the clear policy of Congress as expressed in the act, will be for the shipper to assert a counterclaim and thus indefinitely postpone the actual collection of the carrier's charges, even should the shipper not prevail on his counterclaim."

But under the facts on which the question before the court is propounded, and notwithstanding the mandatory provisions of the Transportation Act, and although there elapsed the period of time from October 17, 1925, to May 7, 1928, the plaintiff's claim for freight was not paid; neither was there paid the defendant's claim for damages.

On May 7, 1928, suit was brought by the carrier for the purpose of collecting its freight charges. Can the shipper in the same action collect its damages resulting from the carrier's negligence in handling that shipment, or must there be further delay to the shipper and another and separate suit brought by him?

Of course, if the freight bill, though small in amount, cannot be collected without suit, there will be costs incurred in such collection, but if the carrier unjustly refuses to pay for damages caused to a shipment through its negligence, then, though the amount of the damages is not large, the shipper must either incur expense in a suit brought to recover the amount or lose same altogether; and it may be that, in some instance, the carrier will, in bad faith, refuse to pay the small claim, having in view the fact that the shipper cannot afford the cost and delay of litigation.

This has been expressed by District Judge Mayer in the case of Wells Fargo & Co. vs. Cuneo, 241 Fed. 727, as follows:

> "So that really what the contention comes down to is that the shipper would be deprived of his rights; for, if the right to counterclaim for damages is denied to him, I cannot appreciate any theory on which he could be permitted to assert precisely the same claim for damages in an independent lawsuit. Indeed, such a construction as plaintiff here urges would give to carriers, under some circumstances, an undue advantage, and might readily work an injustice upon shippers and consignees never contemplated by the statute."

It would also seem that the withholding by one party of the amount to which the other party is justly entitled, is as reprehensible in the one case as the other.

The principles of equality as established by the Hep-

burn Act should extend to each phase of the Interstate Commerce Law and both the carrier and the shipper should have the same rights and privileges as to the procedure, the one with the other, when they resort to the courts for redress of grievances, and the rules of procedure for them should be the same as for other litigants.

The appellee claims that there is no conflict nor inconsistency between Section 914 of the Revised Statutes of the United States, the several sections of the Code of Civil Procedure of the State of California, and the various provisions of the Interstate Commerce Acts, and that upon due consideration of all the laws applicable thereto, it should be held that when sued by a carrier for its transportation charges, a shipper may plead a counterclaim for loss or damage to the identical shipment.

Appellee therefore asserts that the question certified by the Circuit Court of Appeals should be answered "No."

Respectfully submitted,

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